IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04.06.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Appeal Suit No.632 of 2003
and
C.M.P.No.934 of 2007

N.Ramachandran
... Appellant

Vs.

1. E.Varadarajan
2. Yamunarani @ S.Ramani
... Respondents

PRAYER: First Appeal against the Judgment and preliminary decree by the Hon'ble III Additional Judge, City Civil Court, Chennai in O.S.No.5316 of 2001 dated 25.03.2003 decreeing the suit for partition partitioning 1/4th share in the suit property.

For Appellant : Mr.N.L.Rajah for
Mr.Venkatesh Associates

For Respondents : Mr.M.Thamizhavel
Mr.K.Sekar

J U D G M E N T

The defendant in the court below is the appellant. The plaintiffs have filed a suit for partition claiming 1/2 share in the suit property bearing Old No.2 New No.2/1 and 2/2 Sheruffudin Sehib Street, Choolaimedu, Chennai-24. The suit was filed on the basis that V.Natesapillai was the Kartha of Hindu undivided family along with his two sons N.Ethirajan, the father of the first plaintiff and the defendant and the suit property according to the plaintiffs is the copartionary property. The second plaintiff is the wife of the said N.Ethirajan. After the death of Natesapillai who died on 05.01.1959 the coparcenary property devolved by survivorship upon the two sons stated above.

2. According to the plaintiffs, the father of the first plaintiff and the husband of the second plaintiff, namely, N.Ethirajan is stated to have executed a release deed on

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30.12.1972 in respect of his right in the coparcenary property in favour of the defendant and the said release deed is concocted and invalid. At the time when the said Ethirajan executed the release deed the second plaintiff was conceived and the child, namely, the first plaintiff was born on 18.09.1973 and therefore, the first plaintiff was in womb of the mother and therefore, the father had no right to release the share in favour of his brother, namely, the defendant. According to the plaintiffs in spite of the said release the said N.Ethirajan has lived as a coparcenary member in the same property till his death on 16.01.1998 leaving behind him the plaintiffs as his only legal heirs to succeed to his undivided share in the coparcenary property and therefore, the release deed is not valid. According to the plaintiffs, they came to know about the release deed only on 09.09.1998 when the first plaintiff obtained a certified copy of the release deed from the Sub Registrar office, Kodambakkam, Chennai. The plaintiffs have issued a legal notice to the defendant on 05.10.1998 and by a reply notice dated 20.10.1998 the defendant has refused to comply with the said demand. According to the plaintiffs, they came to know about the execution of the release deed by Ethirajan dated 30.12.1972 only on 09.09.1998, the suit came to be filed on 07.09.2001.

3. The case of the defendant in the written statement filed by him was that while it is admitted that the said Ethirajan and the defendant are the sons of V.Natesapillai, it is denied that they constituted an undivided family and that the said V.Natesapillai was the kartha of the family. They also denied that the suit property was a coparcenary property. According to the defendant, V.Natesapillai died on 15.01.1959 and not on 05.01.1959. According to the defendant, after the death of V.Natesapillai the property did not fall on his son by survivorship. The defendant states that V.Natesapillai was working in Burma Railway, after he returned to India in 1941, he has acquired a land at Sarfudeen Shahib Street, Chulaimedu, Chennai and put up a construction. Thereafter, in 1942 and 1943 by different sale deeds he acquired small adjacent bits of lands, all of them combined as Door No.02. The purchase of the adjacent lands were exclusively from the funds of V.Natesapillai. According to the defendant, Natesapillai had his wife, two sons and four daughters. In meeting the expenses for the two daughters' marriage he had mortgaged the said property and he could not clear the same before his death. After his death the said N.Ethirajan and the defendant along with their mother have celebrated the marriage one of their sisters Thulasiammal in 1959 by borrowing Rs.3,000/- from Meenachiammal on 29.10.1959. It is to clear the said amount the said Meenachiammal and also to clear some of the other debts of V.Natesapillai, by mortgaging the property a further mortgage was created on 03.12.1959, since the

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defendant as well as his brother were to perform the marriage of the other sister Anjalakshmi and also to maintain their mother, the mother and sisters executed release deed in favour of the brother on 23.11.1959, making the two brothers, namely, the defendant as well as the said N.Ethirajan as the absolute owners of the immovable property. There were further mortgage since N.Ethirajan was never doing any job and the defendant being the Government servant was managing the family out of his income. The brother of the defendant, N.Ethirajan has executed a release deed in favour of the defendant on 30.12.1972 releasing his right over the Chulaimedu property. Therefore, the defendant has become the absolute owner of the suit property.

4. It is also the further case of the defendant that the defendant has been in continuous and uninterrupted possession from 30.12.1972, namely, the date on which the release deed was executed and in fact thereafter he has mortgaged the property in 1977 as absolute owner even during the lifetime of N.Ethirajan who was also one of the attesting witness of the said mortgage deed. Therefore, according to the defendant he is the absolute owner of the property. While the defendant admits the marriage of his brother N.Ethirajan with the second plaintiff, it is denied that the first plaintiff was born out the wedlock. The defendant also would state that the second plaintiff after marriage with his brother has gone away and did not returne and in fact Ethirajan himself has denied that he was responsible for the pregnancy. Therefore, the defendant denies that the first plaintiff was born to the second plaintiff through his brother (late) N.Ethirajan. It is also denied that there was any coparcenary property and the second plaintiff having deserted her husband N.Ethirajan and by virtue of fact that the N.Ethirajan himself has denied the first plaintiff as his son, the first plaintiff has no right.

5. It is also denied that the plaintiffs came to know about the release deed only on 09.09.1998 especially when the first plaintiff is stated to have completed 28 years of age. It is also stated that N.Ethirajan himself was a sickly person and he has frequently undergone treatment as inpatient and looked after by the defendant as well as his mother during her lifetime. The plaintiffs never bothered to attend to Ethirajan during the time when he was alive and suffering. It is based on the said pleadings the parties went to trial. The second plaintiff was examined as P.W.1 while the first plaintiff as P.W.2 apart from another witness P.W.3 and the plaintiffs have filed nine documents marked as Ex.A.1 to A.9. On the side of the defendant, the defendant was examined as D.W.1 apart from another witness D.W.2 and 15 documents were filed and marked as Ex.B.1 to B.15. The Trial Court has framed the following issues:

1) Whether V.Natesapillai died on 05.01.1959 as stated by the

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plaintiffs or he died on 15.01.1959 as stated by the defendant?
2) Whether the suit property was enjoyed by the plaintiffs and defendant as joint family property?
3) Whether the release deed dated 30.12.1972 executed by N.Ethirajan in favour of the defendant is valid and binding on the plaintiffs?
4) Whether the plaintiffs are entitled for 1/2 share?
5) Whether the plaintiffs are entitled for partition?
6) To what relief?

6. The Trial Court on appreciation of evidence and documents has found that the suit property was purchased by the father of the defendant as well as N.Ethirajan, namely, Natesapillai in parts from 1941 to 1943 under Ex.B2 to B.4 sale deeds and along with the properties situated in Alanthur which he has obtained in a partition, he has enjoyed jointly along with his sons the said Ethirajan, the defendant and his wife and daughters, has come to a conclusion that it is the joint family property. Further, the Trial Court has also found that the first plaintiff was born to N.Ethirajan through the second plaintiff and merely because the said Ethirajan and the second plaintiff were living away, there cannot be presumption and has also come to a conclusion based on records that Ethirajan has admitted that the first plaintiff was born to him. The Trial Court has also found that the first plaintiff was born out of the wedlock between Ethirajan and the second plaintiff and at the time when he was born on 18.09.1973 they were living together as joint family enjoying the property situated at Alanthur obtained by Natesapillai under a partition and also the suit property purchased by him jointly and therefore under Section 20 of the Hindu Succession Act, the first plaintiff would be entitled for a share. The Trial Court has further found that Ex.B.11 release deed executed by N.Ethirajan in favour of the defendant is valid in law and has come to a conclusion that originally N.Ethirajan and the defendant were having equal share in the suit property and after the birth of the first plaintiff he is entitled for 1/2 share from Ethirajan and in respect of the remaining 1/2 share the same should be treated as a release in favour of the defendant under a released deed and has come to a conclusion that the first plaintiff alone is entitled for 1/4th share in the property and rejecting the right of the second plaintiff to have any share in the property. The suit was decreed by passing preliminary decree of partition granting 1/4th share in the suit property to the first plaintiff alone. It is as against the said judgement and decree the defendant has filed the present appeal. It is relevant to point out that the second plaintiff whose claim has been rejected by the court below has not filed any appeal and therefore, in respect of the second plaintiff the judgement and decree of the Trial Court has become final.

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7. Mr.N.L.Rajah, learned counsel appearing for the appellant would submit that when the Trial Court has categorically found that the release deed executed by N.Ethirajan in favour of the defendant under Ex.B.11 dated 30.12.1972 is valid in law and has come into effect which finding has not been challenged by the plaintiffs either by cross appeal or otherwise, it is futile on the part of the plaintiffs to question the authority of N.Ethirajan to execute such a release. That apart it is his contention that there is absolutely no proof to show that the suit property at Choolaimedu was purchased by Natesapillai on 03.10.1941 based on the income from the property at Alanthur which is admittedly a piece of vacant land deriving no income which was ultimately sold only in the year 1960 and in such circumstances it can never even be presumed that the nucleus for the purchase of the suit property has come from the income from the Alanthur property or the suit property is a coparcenary property.

8. He would also submit that there is neither pleading of coparcenary nor any evidence and in fact the witness examined on the plaintiff side has specifically admitted that the suit property was purchased by Natesapillai out of his own fund. According to him even if it is admitted to be a coparcenary property the first plaintiff will have no manner of right when Natesapillai's sons, namely, the father of the first plaintiff Ethirajan and the first defendant and their sisters were alive. Therefore, according to the learned counsel for the appellant the settlement executed by father of the first plaintiff in favour of the defendant is valid in law. He would further submit that even assuming otherwise such document, namely release deed marked as Ex.B.11 can be deemed to be voidable in which event unless the said document is set aside in the manner known law, the present suit for partition is not maintainable. To substantiate his contention he would also rely upon the various judgements reported in AIR 1979 Madras 1, AIR 1986 SC 1753, 2000(2) CTC 154 and 2001 (2) CTC 641.

9. On the other hand, it is the contention of the learned counsel for the respondent that evidence of P.W.2, P.W.3 and even defendant witnesses prove the ancestral nucleus of the suit property lies in the property obtained by Natesapillai under the partition dated 03.04.1940. He would also rely upon the provisions of the Hindu Succession Act, especially Section 20 to show that the first plaintiff who was in the womb of the mother namely, the second plaintiff, at the time when the release deed was executed by his father N.Ehirajan and therefore, such document will become invalid and there is no necessity for him to pray for setting aside the said document, since the said document can be simply ignored as invalid.

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10. On hearing the learned counsel for the appellant and respondent and after referring to the judgement of the Trial Court and various documents. The point that arise for consideration in this case is Whether the judgement and decree of the Trial Court in granting 1/4th share in the suit property to the first plaintiff is valid and passed based on the proper appreciation of facts and law by the court below and as to whether it requires interference by this Court.

11. While the relationship between the parties are admitted, a reference to Ex.A.1 dated 02.04.1940 shows it is a partition deed entered between the sons of Varadapillai including the father of the defendant and grand father of the first plaintiff Natesapillai, apart from other co-sharers in which the said Natesapillai was allotted the B Schedule which is the property situated in Alanthur with measurement of North to South 19 1/2 ft. and East to West 120 ft. The said Natesapillai has purchased the suit property under a registered sale deed dated 03.10.1941 marked as Ex.B.2, a reading of which shows that the said purchase was not made from any ancestral nucleus. On the face of it, it was purchased by Natesapillai out of his income. While it is admitted that the property obtained by Natesapillai by way of partition under Ex.A.1 partition deed, was enjoyed by Natesapillai along with his sons namely, the said Ethirajan as well as the defendant and as admitted by the defendant that it was after the death of Natesapillai the said property was sold by defendant as well as Ethirajan in 1960 and in such circumstances, the question is as to whether the suit property can be treated as an ancestral property having been purchased by Natesapillai under Ex.B.2 on 03.10.1941 out of the income from the property acquired by Natesapillai by partition at Alanthur under Ex.A.1 dated 02.04.1940. As found by the Trial Court on appreciation of Ex.B.2 to B.4, the suit property which was purchased in smaller extent earlier and then other adjacent portions were purchased by Natesapillai subsequently under the said documents were purchased by Natesapillai. The Trial Court has come to a conclusion that only due to the reason that the suit property, which was purchased by Natesapillai was enjoyed along with the property obtained by Natesapillai under the partition of the year 1940 at Alanthur and therefore, it should be presumed to be an ancestral property. Apart from the fact that when once N.Natesapillai has obtained the 1/4th share in the Alanthur property under Ex.A.1 partition deed dated 02.04.1940 it becomes his property since he became a divided member of a joint family and therefore, the question of continuation of ancestral nucleus does not arise. It is not even the case of the plaintiffs that the suit property was purchased from and out of the income from the property acquired by Natesapillai under partition in 1940 under Ex.A.1.

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12. On the other hand, as correctly pointed out by the learned counsel for the appellants, one of the witnesses examined on the side of the plaintiffs, namely, P.W.3, one M.Ganesan who is stated to be closely related to Natesapillai has categorically admitted that the suit property was purchased as a vacant land by Natesapillai out of his own funds and it is his individual property and not ancestral property. The specific admission by P.W.3 in the cross examination as follows:

> "தாவா சொத்து காலிமனையாக நடேசபிள்ளை அவருடைய பணம் கொடுத்து வாங்கிய சொத்துதான். இரண்டு பத்திரங்களின் மூலம் வாங்கினார். அந்த பத்திரங்களை நான் பார்த்தது இல்லை. நடேச பிள்ளை என்னடைய தாயாரின் சகோதரியின் கணவர். எனக்கு சித்தப்பா உறவு. 1941ல் எனக்கு சுமார் 15 வயது இருக்கும். நான் அவரோடு வசித்தது இல்லை. தாவா சொத்து வாங்கிய வகையில் நடேச பிள்ளையின் தனிப்பட்ட சொத்துதான் அவருடைய கூட்டு குடும்ப சொத்து இல்லை என்றால் ஆமாம்."

13. In the face of such clear admission by the witness examined on the side of the plaintiffs that the suit property was not ancestral in nature and in the absence of any evidence on the side of the plaintiffs to show that the suit property was purchased by Natesapillai from and out of any ancestral nucleus, it is not known as to how the Trial Court has come to a conclusion that the suit property is an ancestral property. In this view of the matter there is no difficulty to come to the conclusion that the finding by the Trial Court that the suit property is an ancestral property is clearly based on the total and improper appreciation of evidence. Therefore, in the absence of the ancestral nucleus for purchase of the suit property it only follows that inasmuch as Natesapillai has died intestate on 05.01.1959 and not 15.01.1959 as stated by the plaintiff, as admitted by the learned counsel for the defendant himself and in such circumstances, at the time of the death of Natesapillai his wife his two sons namely, Ethirajan and the defendant apart from his daughters alone were entitled to inherit his properties as class 1 heirs and the first plaintiff even assuming that he was the son born to the second plaintiff through N.Ethirajan as it is found by the Court below, he was certainly excluded from claiming the share in the presence of his father N.Ethirajan, who died on 16.01.1998 as it is seen under Ex.A.3 death certificate issued by the Corporation of Chennai. Therefore, the first plaintiff's right arises only from the right of his father namely, N.Ethirajan and not individually as it can never be said that the defendant and his brother N.Ethirajan have constituted a coparcenary property as it is seen on the factual position in this case. Therefore, when N.Ethirajan who was being the son of Natesapillai,

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being a class 1 heir entitled to inherit his father's property along with his brother the defendant and his mother and sisters is certainly entitled to release his share in favour of the first defendant.

14. The exclusion of grandson in the presence of the father being the class 1 heir entitled to succeed under Section 8 of the Hindu Succession Act, has been clearly laid down by the Full Bench Judgement of this Court rendered in The Additional Commissioner of Income Tax, Madras-1 Vs. P.L.Karuppan Chettiar reported in AIR 1979 Madras 1 in the following words:

> "6. The question is whether when succession opens under Section 8, Karuppan and his son will take the property in the same manner. Clearly, this is not so. When we search for the relatives mentioned in class I of the schedule, which is attracted by virtue of Section 8, we find no sons are mentioned at all though the grandson of a deceased son is mentioned. What would be the effect when such a grandson comes into the picture need not be dealt with in this case. But where the son as well as his son are the persons concerned, by applying Section 8, we have to come to the conclusion that the father alone, namely, Karuppan in this case will inherit the property to the exclusion of the grandson. This being the effect of the statutory provision, no interest will accrue to the grandson in the property which belonged to Palaniappa. Even assuming Palaniappa's property is ancestral property in the hands of Karuppan, still because of the effect of the statute, Karuppan's son will not have an interest in the property. This is directly derogatory of the law established according to the principles of the Hindu Law and this provision in the statute must prevail in view of the unequivocal expression of the intention in the statue itself which says that to the extent to which provisions had been made in the statute, those provisions shall override the established provisions in the texts of Hindu Law. This is what M.H.Beg J, as he then was, said in the decision in Commr.of Income Tax V. Ram Rakshpal, (1968)67 ITR 164 (All). Commenting on this, Divan C.J. in Commr. Of Income Tax Vs. Babubhai Mansukhbhai (1977) 108 ITR 417 at P.420 (Guj) made the following observations:
> "The Division Bench there held that in view of the provisions of Section 6 and Section 8 of the Hindu Succession Act, the old position no longer prevailed and the income from assets inherited by a son from

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his father must be held to be his individual and not the income of the Hindu undivided family consisting of himself and his son. Main reliance in support of this conclusion was placed by the Allahabad High Court on the provisions of Section 6 and 8 of the Hindu Succession Act. The Allahabad High Court accepted the principle that if it had not been for the Hindu Succession Act, on the death of a father whatever was inherited by his son by way of succession became ancestral property in the son's hands and this ancestral property in the hands of the son belonged to the coparcenary or the joint Hindu family consisting of the son and his own male issue ....."

After discussing the matter at some leng, the learned Chief Justice observed at p.422-

".....with respect to the learned Chief Justice of the Allahabad High Court, it is impossible to read into the words of Section 8 any provision which interferes with the scheme of Hindu Law as it prevailed prior to the enactment of the Hindu Succession Act. Neither Section 6 nor S.8 nor Section 30 affects this principle of Hindu Law as to in what capacity or in what character the son would enjoy the property once he received it from his father in succession."

Proceeding further, the learned Chief Justice, referred to a passage from Mulla's Principles of Hindu Law. 14th Edn.edited by S.T.Desai. Illustration (a) at page 849 of the commentary is then extracted and the learned Chief Justice agreed with the Commentary and the illustration. With very great respect, we are unable to agree with the view expressed by the learned Chief Justice. The passage quoted from the commentary did not deal with the effect of Section 8 of the Act. What has been illustrated also is the position under the Hindu Law untrammelled by statutes and it occurs in the commentaries to Sec.6 of the Act which deals with survivorship and the saving by Section 6 of that principle to the extent to which it had been done. This passage is of no assistance in determining the impact of Section 8 on the principles of devolution of property on the death on the principles of inheritance. We have dealt with the effect of Section 8 earlier and it is clear that here Karuppan alone took the properties of his father Palaniappa which the latter had obtained in the partition, and

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irrespective of the question whether it was ancestral property in the hands of Karuppan or not, he would exclude his son. Since the existing grandson at the time of the death of the grandfather has been excluded, we think that an after born son of Karuppan will also not get any interest which Karuppan inherited from his father. Thus, the principles of Hindu Law are not applicable. It is impossible to visualise or envisage any Hindu undivided family in regard to the property which Karuppan got. This is the view that we have taken in the decision in T.C.No.276 of 1972; (1977 Tax LR 1420) (Mad) Addl.Commr.of Income Tax Madras Vs. V.R.A.Manicka Mudaliar to which one of us was a party. We respectfully agree with the view expressed in that decision and answer the question referred to us in the affirmative i.e.in favour of the assessee and against the Department. The Revenue will pay the costs of the assessee including counsel's fee of Rs.500."

That was followed by a decision rendered by this Court by K.P.Sivasubramaniam,J. in Anjali and 6 others Vs. Arumugam Chettiar and another reported in 2000(II) CTC 154 wherein it was held that mere suit for declaration of title and injunction without setting aside documents is not maintainable after analysising the various judgements on the point. The relevant passage of the judgement is

"6. In support of his submission that there was no necessity to pray for setting aside the release deed, reliance is placed on the judgement in N.S.Ramaswami,J. Reported in V.nataraja Iyer and others Vs. Arunschalam and others, 1976 (II) M.L.J. 326. In that case, learned Judge held that with reference to joint family property, as regards the alienation made by manager, when the minor coparceners question the alienation, they would not be obliged to pray for setting aside alienation. Learned counsel also refers the judgement of Full Bench of this Court stated in the very same judgment in Kandaswami Udayan Vs. Annamalai Pillai, 51 L.W.11.

7. Per contra, Mr.G.Rajagopalan, learned counsel appearing for the respondents contends that the transaction is not a void one but only a voidable one, having regard to the judgement of the Supreme Court reported in Divyadip Singh and others Vs. Ram Cachan Mishra and others, JT 1997 (1) S.C.504.

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Reliance is placed on the observation that when the natural guardian without the previous permission of the court had alienated the property, it was voidable at the instance of the minor. Therefore, according to the learned counsel, the sale as well as the release being only voidable and not void, there was an obligation on the part of the plaintiff to have prayed, to set aside the earlier transaction. He would also rely upon the judgement of the Full Bench of this Court reported in Mir Ghulam Hussain Sahib Vs. Ayesha Bibi and others A.I.R.1941 Mad.481 wherein the Full Bench held that the transfer by guardian appointed by Court without. Court sanction is voidable and not void. It is valid unless set aside at the instance of minors, within limitation.

8. Reference is also made to another judgment of this Court reported in Sankaranarayana Pillai and another Vs. Kandasamia Pillai, 1956(II) M.L.J. 411. The Full Bench held in that case that when the minor was co nominee a party to a sale deed or others document of alienation by a guardian which he seeks to set aside, it is not enough for him to merely sue for possession but he must have also prayed for cancellation of the document and pay due court fee for the said prayer,

9. Therefore, having regard to the declaration of the law by the Supreme Court holding that the transaction of the present nature was only voidable and not void, the Courts below have rightly held that the plaintiffs ought to have prayed for setting aside the release in favour of the defendants."

15. It is at this juncture relevant to point out that the Trial Court itself has come to a conclusion that the release deed executed by N.Ethirajan in favour of defendant on 30.12.1972 under Ex.B.11 is valid in law and has been acted upon and the said finding has become final and has not been questioned by the plaintiffs anywhere. This point has been lost sight by the learned Trial Judge. When that is the position that when the father of the first plaintiff N.Ethirajan was alive even at the time when the first plaintiff was born which was on 18.09.1973 especially in the circumstance that it is not a coparcenary property, there is no question of application of Section 20 of the Hindu Succession Act, 1956. The said section applies only in cases where a person having right of inheritance under a coparcenary property who dies when his child was in the womb of his mother, that child who born subsequently, after the death of the intestate father will have the same right of the father. The said Section 20 runs as follows:

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"20. Right of child in womb- A child who was in the womb at the time of the death of an intestate and who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of the death of the intestate."

16. In the present case it is not as if the father of the first plaintiff namely, N.Ethirajan died when the first plaintiff was in the womb of the mother. On the other hand, at the time of the birth of the first plaintiff which was on 18.09.1973 Ethirajan was alive who died much later namely on 16.01.1998. Therefore, there is no question of applicability of Section 20 of the Hindu Succession Act, 1956 to the facts and circumstances of this case. Therefore, the finding of the Court below by placing reliance on Section 20 of the Hindu Succession Act, 1956 by treating the suit property not only a copartionary property but also holding that at the time when the said N.Ethirajan has executed a release deed in favour of defendant on 30.12.1972 the first plaintiff who was born on 18.09.1973 should have been presumed to be in the womb of the mother and therefore, the release deed executed by the first plaintiff's father in favour of the defendant to the extent of the share of the first plaintiff is invalid cannot be the correct position of law. There are more than one reason for arriving at such conclusion, first of all there is absolutely no proof to show that the suit property was a coparcenary property. Secondly even assuming it is the joint property enjoyed by N.Ethirajan, defendant and their sisters jointly and Natesapillai died intestate, it is only the brothers and sisters and wife of the Natesapillai as class 1 heirs who can have the right of inheritance and the first plaintiff can have no right at all since Section 20 of the Hindu Succession Act has no application. In such circumstances, the finding by the Court below that the release deed executed by N.Ethirajan under Ex.B.11 in favour of the defendant to the extent of 1/4th share of the first plaintiff is not valid, is not based on the correct appreciation of fact and legal position, especially in the circumstances, that the genuiness and legality of Ex.B.11 release deed has been held in affirmation by the Trial Court which has become final between the parties.

17. One other question that arises for consideration in this case is even assuming that the release deed executed by the father of first plaintiff in favour of the defendant under Ex.B.11 is not binding on the first plaintiff it can at the most be a voidable instrument which can be set aside at the option of the aggrieved party. The question now that arises is as to whether the plaintiffs have taken any steps to set aside that document at all.

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Apart from the fact that this can only be an academic question since the Trial Court has already come to a conclusion that Ex.B.11 release deed is valid in law and therefore, it is not open to the first plaintiff to attempt to set aside on the reason of any the vitiating factors like misrepresentation, fraud, coercion or undue influence, the pleading of the plaintiffs are otherwise, the release deed has never been assailed by the plaintiff's on the vitiating factors.

18. Even though this is purely of academic in nature as correctly pointed out by the learned counsel for the appellant that the suit for partition without praying for setting aside the release deed is not maintainable.

119. In view of the above said analysis, I have no hesitation to come to the conclusion that the decision of the Court below in holding the suit property as coparcenary property and declaring that N.Ethirajan could not have released the 1/4th share of the first plaintiff validly as per Section 20 of the Hindu Succession Act, 1956 and that the first plaintiff is entitled for 1/4th share in the suit property is totally on the wrong appreciation of factual and legal position and in view of the same the judgement and decree of the Court below in granting a partition decree to the extent of 1/4th share to the first plaintiff is set aside and the first appeal stands allowed. However, there will be no order as to cost.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

nbj

To

1. The III Additional Judge,
City Civil Court, Madras. (with records if any)

2. The Section Officer
VR Section, High Court, Madras.

2 ccs to Mr.N.L.Rajah, Advocate, sr. 31631

A.S.No.632 of 2003

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